Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-12

AIR EAST, INC., d/b/a ALLEGHENY COMMUTER, AIR EAST, INC., CHARLES ALLAN McKINNEY, JAMES AVERY TALLENT, JEFFREY H. WILKINSON and THOMAS REDDECLIFF,

Petitioners,

vs.

NATIONAL TRANSPORTATION SAFETY BOARD and ALEXANDER P. BUTTERFIELD, Administrator of the Federal Aviation Administration,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners Air East, Inc., d/b/a Allegheny Commuter, Air East, Inc., Charles Allan McKinney, James Avery Tallent, Jeffrey H. Wilkinson and Thomas Reddecliff respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this proceeding on March 13, 1975.

Opinions Below

The opinion of the Court of Appeals, reported at 512 F. 2d 1227 (3d Cir. 1975), appears in Appendix B hereto. The opinion of the National Transportation Safety Board,

reported as NTSB Order No. EA-581, appears in Appendix C hereto. The opinion of Administrative Law Judge Fred L. Woodlock appears in Appendix D hereto.

Jurisdiction

The judgment of the Court of Appeals for the Third Circuit was entered on March 13, 1975. A timely petition for rehearing *en banc* was denied on April 7, 1975. This petition for certiorari was filed within ninety days of the latter date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Questions Presented

1. Whether the summary revocation of petitioners' aviation licenses without adequate statutory or regulatory guidelines and without a prior hearing is a violation of due process of law.

2. Whether the petitioners were denied due process on the review of the summary revocations of their aviation licenses

(a) by the failure to give adequate notice of the charges alleged;

(b) by the failure to dismiss stale charges;

(c) by the failure to dismiss charges not alleged to be in violation of any regulation or statute;

(d) by the Administrator's supplying the Board and the Law Judge with prejudicial material outside of the record;

(e) by the failure of the Law Judge and Board to make adequate findings of fact and conclusions of law and to specify the reasons therefor;

(f) by the failure of the Law Judge, Board and Court of Appeals to apply correct principles of law;

(g) by the failure of the Board to give the petitioners adequate time to prepare their appeal and by denying them oral argument;

(h) by the refusal of the Board and Court of Appeals to pass upon the constitutionality and application of various federal air regulations; and

(i) by applying the sanction of revocation when the petitioners did not violate any federal aviation regulation which provided for the penalty of revocation.

Statutes Involved

The statutory provisions involved are in Title 49, United States Code §§ 1429, 1485(a), which are printed in Appendix A hereto.

Statement of the Case

Prior to March 7, 1974, Air East, Inc., conducted scheduled air taxi passenger operations serving the Pennsylvania communities of Pittsburgh, Johnstown, Altoona and Harrisburg, and scheduled air mail operations serving Pittsburgh, Johnstown, Bradford, DuBois and Harrisburg. In connection with its air taxi operations, Air East was also an authorized aircraft repair station. The individual petitioners herein were pilots employed by Air East in connection with its flight operations, except for the petitioner Reddecliff, who was chief mechanic for the repair station.

Air East, Inc, was the holder of an Air Taxi Commercial Operator Certificate issued on August 21, 1969, and a Repair Station Certificate issued on August 21, 1970. Petitioners Charles Allan McKinney and Jeffrey H. Wilkinson were holders of commercial pilot certificates, while peti-

tioner James Avery Tallent was the holder of an airline transport pilot certificate. Petitioner Thomas Reddecliff was the holder of a mechanic's certificate with airframe and powerplant ratings. All of the aforesaid certificates were issued by the Federal Aviation Administration (hereinafter referred to as the FAA).

On or about January 18, 1974, the Administrator undertook a review of Air East's operations and, after interviewing various former employees and examining various records over a seven-week period, apparently concluded that Air East's operations as well as the piloting of its management personnel constituted an emergency to air commerce. At no time were petitioners requested to participate in the FAA investigation, advised of the charges against them, or asked for an explanation concerning the charges alleged against them.

On March 7, 1974, John J. Keyser, Assistant Chief Counsel of the FAA, purportedly acting on behalf of the Administrator of the FAA, issued emergency orders of revocation which immediately revoked all of the certificates above mentioned (R. I 1-27*). The alleged statutory authority cited for such orders was Sections 609 and 1005(a) of the Federal Aviation Act of 1958, as amended, 49 U.S.C.A. §§ 1429 and 1485(a) (reproduced in Appendix A). The petitioners appealed said orders to the National Transportation Safety Board (hereinafter referred to as the NTSB or the Board) on or about March 11, 1974, and the Administrator filed his complaints (exact duplicates of the emergency orders, R. I 37-42) on March 14, 1974. The cases were consolidated and assigned to NTSB Law Judge Fred L. Woodlock. A pre-trial conference was held

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* As used herein, "R. I 1-27" refers to the Record (R.) in the Court of Appeals, the volume thereof (I), and the pages therein (1-27) where the documentation is located. The Clerk of the Court of Appeals has been requested to transmit a certified copy of the record to this Court pursuant to Supreme Court Rule 21(1).

on March 20, 1974, at which time various orders relating to discovery were entered, including an order directing the Administrator to serve bills of particulars as to each charge because of lack of specificity in the complaints (R. II 356-361). Trial began on March 21, 1974.

On Friday, March 22, 1974, the Administrator gave to the Chairman of the NTSB, *ex parte* and outside the official records, certain defamatory material relating to the petitioners herein and impliedly criticizing certain discovery rulings made by the Law Judge that were adverse to the Administrator. A copy of this material was also given to the Law Judge and to petitioners' counsel at the close of the day's proceedings on March 22, 1974. On Monday, March 25, 1974, the petitioners moved to dismiss the charges based upon this improper and unethical approach by the Administrator to the Law Judge and the Board (R. I 248-258). The Law Judge denied said motion (R. VII 357-368).

On April 1, 1974, the Administrator requested and received the right to take an interlocutory appeal to the Board with respect to the Law Judge's ruling that the Administrator was limited in his evidence to those charges specified in the bills of particulars.

On April 5, 1974, petitioners moved to disqualify the entire NTSB from further participation herein (R. I 259-266), and on April 8, 1974, NTSB Chairman John H. Reed disqualified himself. The other Board members denied petitioners' motion for disqualification in Order EA-568 (R. II 376-382). On the same date, the Board denied the Administrator's interlocutory appeal and held that the Administrator was limited at the hearing to the introduction of evidence within the confines of the various bills of particulars (R. II 383-385). In spite of this ruling, the Law Judge continued to allow the Administrator's attorney to make proffers of other evidence for the record relating to acts not specifically charged.

The Administrator presented his evidence from March 22, 1974, to April 18, 1974. At the termination of the Administrator's case, the Law Judge dismissed Charges 11 and 18 of the Air East d/b/a Allegheny Commuter complaint (R. I 1-7) and Charge 4(g) of the Charles Allan McKinney complaint (R. I 8-12).

The petitioners proceeded with their case under protest (R. XV 3429-30). The trial ended on April 24, 1974, and the Law Judge issued his oral initial decision on April 26, 1974 (Appendix D). The Law Judge found against the petitioners on all charges except Charges 9 and 20 of the Air East d/b/a Allegheny Commuter complaint (R. I 1-7); Charge 4(g) of the Tallent complaint (R. I 13-17); Charge 3(f) of the Wilkinson complaint (R. I 18-21); and Charge 5 of the Air East Repair Station complaint (R. I 25-27). The Law Judge affirmed the Administrator's order of revocation in each case.

Petitioners appealed from said initial decision on April 28, 1974 (R. I 308). The Administrator also filed a Notice of Appeal on April 29, 1974 (R. I 310). On April 30, 1974, the petitioners moved to dismiss the Administrator's appeals on the ground that they had not been timely filed (R. I 313).

In accordance with Board rules, the petitioners filed their brief on appeal by mail on May 3, 1974, and on May 6, 1974 requested oral argument before the Board (R. I 324). On May 10, 1974, the Board adopted its opinion and Order EA-581 (issued on May 13, 1974) which denied petitioners' appeal, affirmed the initial decision of the Law Judge with one modification, and affirmed the Administrator's emergency orders revoking the petitioners' certificates. The one modification made by the Board was to dismiss Charge 4(h) of the Tallent complaint (Appendix C, fn. 116).

Petitioners' request for oral argument before the Board was denied by said order, and the issues raised by the

Administrator's appeal and petitioners' motion to dismiss said appeal were not reached.

The petitioners then filed timely appeals to the United States Court of Appeals, which affirmed the orders of revocation on March 13, 1975.

Reasons for Granting the Writ

The summary revocation of aviation licenses without prior hearing on the alleged grounds of "air safety" presents an important issue of federal law on which there are no statutory or regulatory guidelines, and the procedures followed in the review of such action are so lacking in due process that immediate clarification is needed by the Supreme Court to resolve conflicts between the Circuits and among the District Courts.

1. The summary revocation of the aviation licenses herein without adequate statutory or regulatory guidelines and without a prior hearing was a violation of due process.

The aviation certificates involved herein are licenses that are within that class of rights which are protected from arbitrary governmental action. *Bell* v. *Burson*, 402 U. S. 535, 91 S. Ct. 1586, 29 L. Ed. 2d 90 (1971); *Priority Air Dispatch, Inc.* v. *National Transportation Safety Board*, —— F. 2d —— (D.C. Cir. June 19, 1975, Docket No. 73-2169, slip opinion pp. 775-784). The due process clause of the United States Constitution requires a prior hearing before the revocation of such rights, "except for extraordinary situations where some valid governmental interest is at stake which justifies postponing the hearing until after the event." *Boddie* v. *Connecticut*, 401 U. S. 371, 378-379, 91 S. Ct. 780, 28 L. Ed. 113 (1971). However, as to such exceptions, this Court has stated:

> ". . . These situations, however, must be truly unusual. Only in a few limited situations has this

> Court allowed outright seizure without opportunity for a prior hearing. First, in each case, the seizure has been directly necessary to secure an important governmental or general public interest. Second, there has been a special need for very prompt action. Third, the State has kept strict control over its monopoly of legitimate force: the persons initiating the seizure has been a government official responsible for determining, under the standards of a narrowly drawn statute, that it was necessary and justified in the particular instance." *Fuentes* v. *Shevin,* 407 U. S. 67, 90-91, 92 S. Ct. 1983, 32 L. Ed. 2d 556 (1972).

Section 609 of the Federal Aviation Act of 1958, as amended (49 U.S.C.A. §§ 1655(c)(1) and 1429), does authorize the Administrator to revoke any certificate issued by him upon a determination "that safety in air commerce or air transportation and the public interest requires" such action (Appendix A). If an appeal is taken from such action to the Board, the revocation is stayed unless the Administrator "advises the Board that an emergency exists and safety in air commerce or air transportation requires the immediate effectiveness of his order." 49 U.S.C.A. §§ 1429, 1485(a) (Appendix A).

The Administrator's procedural regulations relating to certificate action are contained in 14 C.F.R. Part 13. None of these regulations provides for participation by interested parties in the agency decision-making process. Once the FAA reaches a decision it advises the party of its proposed certificate action and the party then has certain options, the best of which is a request for an informal conference where safety violations are concerned. 14 C.F.R. § 13.19. However, if the FAA considers the situation an "emergency," there are no regulations or procedures permitting the certificate holder to present his side of the story before the Administrator or his designee revokes the certificate.

Besides the instant proceeding, summary action by the Administrator in the name of "air safety" has been before the courts three times in recent years, and in two cases the authority to revoke prior to a hearing was held to be an unconstitutional denial of due process and in the other case the Court side-stepped the issue by finding that there had been an opportunity, albeit informal, to present the certificate holder's position before the Administrator acted.

In *United States* v. *Harper,* 335 F. Supp. 904 (D. Mass. 1972), the Administrator sought a mandatory injunction requiring the defendant Harper to surrender his airman and medical certificates on the ground that there had been an emergency revocation of the same by the Administrator. The defendant challenged the Administrator's emergency order of revocation on the ground that he had not been given an opportunity to answer any charges and be heard as to why his certificates should not be revoked. Judge Wyzanski dismissed the Government's complaint, holding:

> "Insofar as 49 U.S.C. § 1429 purports to authorize a permanent revocation of a certificate without giving the holder an opportunity to be heard, that statutory section deprives the holder of due process of law guaranteed by the Fifth Amendment. The right of a person to be heard before he is deprived of his property by governmental action is the most elementary, fundamental, and comprehensive of the rights guaranteed by the due process clause of the Fifth Amendment. [Cases cited.] Such a guarantee may be validly limited only under the most compelling circumstances and then generally only for the briefest of periods. Here no such compelling circumstances exist." 335 F. Supp. at 906-907.

An appeal to this Court was vacated and the case remanded with directions to dismiss as moot. 406 U.S. 940 (1972).

In *Priority Air Dispatch, Inc.* v. *Brinegar,* not off. reported, 12 CCH Aviation Reporter 18,046 (D. D.C. 1973),

the plaintiff obtained a preliminary injunction when the Administrator revoked on an emergency basis plaintiff's FAA exemption for the carriage of hazardous materials because of alleged violations of the federal aviation regulations. In granting the preliminary injunction, the Court held:

> ". . . it appears that plaintiff is entitled to notice of charges and an adversary hearing prior to termination or revocation of its exemption . . ."

When the NTSB subsequently held that it lacked jurisdiction to review the Administrator's emergency revocation of P.A.D.'s exemption, the Court of Appeals reversed the Board and ordered it to proceed to a hearing on the revocation of both the exemption and the plaintiff's air taxi certificate. *Priority Air Dispatch, Inc.* v. *National Transportation Safety Board,* —— F. 2d —— (D.C. Cir. June 19, 1975, Docket No. 73-2169, slip opinion pp. 775-784). In his concurring and dissenting opinion, Judge Danaher stated:

> "I am entirely satisfied that Priority was and is entitled, after notice of specific charges, to an evidentiary hearing before its operating authority shall be cancelled." (Slip opinion p. 784)

It would thus appear clear that the Court of Appeals for the District of Columbia has at least implicitly approved the decision by the District Court that an adjudicatory hearing based upon specific charges must be afforded to the operator before his exemption or certificate is revoked even when the Administrator proceeds to act on an emergency declaration based upon alleged air safety violations.

In *Aircrane, Inc.* v. *Butterfield,* 369 F. Supp. 598 (E.D. Pa. 1974), a three-judge federal District Court was called upon to decide the constitutionality of that portion of the Federal Aviation Act which allowed for the summary

seizure of an aircraft for an alleged violation of a safety regulation.[1] In a careful analysis of all the recent Supreme Court decisions relating to the need for a prior hearing before termination of rights, the Court concluded that the ultimate issue was "a balancing of the government's interest in summary action against the property owner's interest in adjudicating his rights prior to government action." 369 F. Supp. at 604. In undertaking its consideration of the various interests involved, the Court initially disposed of the Government's waving of the "air safety" flag by observing:

> "As a starting point, we believe that the dangers inherent in summary governmental action impel the courts to scrutinize closely governmental interests which supposedly justify such procedures. We do not believe that the sections which are challenged as unconstitutional should be upheld simply by referring to the overriding purpose of the Federal Aviation Act . . . The legitimate objectives of a statutory scheme as extensive as the FAA Act do not necessarily immunize from attack each and every section and regulation promulgated under it." 369 F. Supp. at 605.

The Court then proceeded to analyze the Government's interest in summary action and concluded that the federal air regulation upon which the alleged violation was based was related to air safety and that the FAA's actions were therefore prompted by a legitimate governmental concern for public safety.

As opposed to the Government's interest, the Court could find very little countervailing reasons why summary action would adversely affect the owner's interest. First, the Court found that the seizure of the aircraft would not significantly impair Aircrane's ability to ultimately vin-

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[1] Case Note, 40 J. Air Law & Com. 749 (1974).

dicate its rights because the aircraft, while an extremely valuable asset, would be returned to the owner upon the posting of a small bond, and therefore the owner was not unduly burdened in mounting a meaningful legal attack on the agency's action by the lack of its operating assets. Secondly, the Court found that prior to seizure the owner of the aircraft had the opportunity to advise the FAA in detail of its position with respect to the alleged violations. This pre-seizure discussion was held to satisfy the acknowledged principle that:

> ". . . One of the reasons due process ordinarily requires that adverse parties receive a full opportunity to present their respective positions is that 'fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights. . . . No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it.'" 369 F. Supp. at 607.

Finally, the Court concluded that the limited inconvenience to the owner of the aircraft, i.e., the posting of a $1,000 bond, weighed in favor of upholding the statutory scheme.

Although the Court balanced the competing interests in favor of summary action by the Government, it was clearly disturbed by several factors:

> "Against these reasons for upholding the seizure provisions, we balance two considerations which, under the language of *Fuentes,* do cut somewhat in Owners' favor. First, there does not appear to be present here the type of emergency such as was posed by contaminated food in *North American Storage, supra,* and second, there is some question whether the seizure here took place under a sufficiently narrowly drawn statute to insure that summary action takes place only when 'necessary and justified.'" 369 F. Supp. at 608.

In its final analysis, the Court upheld the constitutionality of the summary seizure on a very narrow point:

> "We have based our decision to uphold this statutory scheme on the conclusion that the salient facts of the case justify viewing it as an exception to *Fuentes,* in which notice and hearing may be dispensed with. We note in passing, however, that even if the *Fuentes* principles applied, we are of the view that the extended exchange of communications between Owners and the FAA *before* the seizure might well have constituted sufficient notice and hearing to satisfy due process under the circumstances." 369 F. Supp. at 608-609.

Petitioners would distinguish *Aircrane* from their case on two very important points: First, unlike *Aircrane,* the petitioners herein were not given notice of the charges against them or offered an opportunity to rebut them prior to emergency revocation. Secondly, once revoked, the petitioners lost their means of livelihood and lacked the financial resources to present a meaningful defense during the Board proceedings. Cf. *Goldberg* v. *Kelly,* 397 U. S. 254, 90 S. Ct. 1011, 25 L. Ed. 2d 287 (1970).

In analyzing the present situation under the three criteria set forth in *Fuentes* (*supra,* pp. 7-8), petitioners concede the first criterion of *Fuentes,* i.e., that an important government or general public interested is involved in air safety.[2] Petitioners submit, however, that criteria two and three are lacking herein, i.e., the special need for very prompt action and the decision to revoke being necessary and justified and made by the responsible government official under the standards of a narrowly drawn statute.

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[2] Petitioners contend, however, that, as in *Aircrane,* the Court must examine each regulation to determine whether it is applicable and involves a matter of air safety that would warrant the summary action taken by the Government. The Court of Appeals did not undertake such a review (see pp. 37-38 *infra*).

One must immediately question where the "emergency" was in the present situation which justified the need for "very prompt action." The Administrator's investigation took seven weeks, and during this time Air East operated with a perfect safety record. Indeed, Air East in its three-year history had conducted some 36,000 flights with only one accident, the cause of which was not shown to be in any way related to the charges in the complaints (R. VI 245-7). Furthermore, the individual petitioners and the repair station had never been convicted of any prior safety violations. Where, then, was the "truly unusual" situation which justified revocation prior to hearing?

The decision by the Court of Appeals justifies the leisurely pace of the FAA's seven-week investigation by concluding that serious consideration was being given to the charges. This was certainly based upon good faith conjecture by the Court since there was no evidence in the record as to the reason for the prolonged investigation; but even if such a delay was based upon the FAA's "serious efforts . . . to establish the validity of the charges," it is difficult to conform such assiduousness with the general and unspecific charges eventually filed by the FAA in the revocation orders (see Appendix C, pp. A20-A43).

Furthermore, the Court of Appeals' decision overlooked the fact that in 1973 petitioner Air East was the subject of two normally scheduled FAA field investigations which resulted in favorable reports. Thus, in the one-year period prior to revocation, Air East received three extensive investigations by the FAA—two conducted by experts assigned to the FAA's System Worthiness Analysis Program (SWAP),[3] which found no significant deviations from pre-

[3] As to the value that the FAA places on its SWAP investigations, see *Administrator* v. *Robertson*, Docket No. 74-450, decided June 24, 1975, 43 Law Week 4833.

scribed rules and regulations (R. VII 602-621),[4] and a third investigation conducted by FAA lawyers, in a "somewhat covert" manner as acknowledged by the Third Circuit, who apparently concluded that the "public interest" required the revocation of all the certificates held by the petitioners, although these same lawyer/investigator/aviation experts were incapable of identifying in their revocation orders any date, time or place of a specific violation.

While it is true that Air East had its first and only accident on January 6, 1974, this accident was not shown to be related to or caused by any of the violations alleged in the complaint (R. XIII 2704).[5] It is therefore clear that, based on Air East's exemplary safety record, its prior inspections by FAA SWAP teams, and its acknowledged willingness to discuss problems with FAA inspectors, there was no emergency to justify summary revocation of the petitioners' certificates.

It is equally clear that the emergency revocations herein were not made under the standards of a narrowly drawn statute. Initially petitioners point out that the statute authorizes the Administrator to dispense with notice and hearing when he "is of the opinion that an emergency requiring immediate action exists in respect of safety in air commerce." 49 U.S.C.A. § 1485(a) (Appendix A). Insofar as the decision to revoke without a hearing can rest upon

[4] In addition, the Chief of the FAA's Pittsburgh General Aviation District Office (GADO) testified that Air East's management always displayed compliance disposition and was willing to sit down and work out problems with GADO inspectors (R. VIII 801).

[5] When Pan American World Airways had three disastrous crashes in the South Pacific within one year (Tahiti, July 23, 1973; Pago Pago, January 30, 1974; and Bali, April 22, 1974), the FAA did not revoke its operating certificate. Nor when DC-10 cargo doors came off in midair due to faulty design did the FAA ground the aircraft or revoke McDonnell Douglas production certificate. Obviously, safety decisions are made on an *ad hoc* basis, and consistently in favor of the "big guy."

"the opinion" of the Administrator as to such a vague term as "safety," petitioners contend that the "standards of a narrowly drawn statute" are nonexistent and the grant of such power is unconstitutional as violative of due process.[6] *Giaccio* v. *Pennsylvania,* 382 U. S. 399, 86 S. Ct. 518, 15 L. Ed. 2d 447 (1966); see *Grayned* v. *City of Rockford,* 408 U. S. 104, 108-109, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972).

The Court of Appeals agreed that the statute was broad, but concluded that such a vast discretionary grant of authority was necessary in order to carry out the purposes of the statute. But even if this grant of authority can be constitutionally justified (which petitioners do not concede), the failure of the Administrator to prescribe specific rules and regulations advising the aviation community and the public as to when and how it will be exercised cannot be constitutionally justified. *Environmental Defense Fund, Inc.* v. *Ruckelshaus,* 439 F. 2d 584, 597-598 (D.C. Cir. 1971); *Holmes* v. *New York City Housing Authority,* 398 F. 2d 262, 265 (2d Cir. 1968); *Hornsby* v. *Allen,* 326 F. 2d 605, 610 (5th Cir. 1964).

Indeed, as Mr. Chief Justice Burger once held:

> ". . . Such debarment cannot be left to administrative improvisation on a case-by-case basis. The governmental power must be exercised in accordance with accepted basic legal norms. Considerations of basic fairness require administrative regulations establishing standards for debarment and procedures which will include notice of specific charges, opportunity to present evidence and to cross-examine adverse witnesses, all culminating in administrative findings and conclusions based upon the record so made." *Gonzalez* v. *Freeman,* 334 F. 2d 570, 578 (D.C. Cir. 1964).

[6] This Court has had occasion to criticize as being vague such statutory terms as "in the public interest." *Environmental Protection Agency* v. *Mink,* 410 U. S. 73, 79, 93 S. Ct. 827, 35 L. Ed. 2d 119 (1973).

And as Professor Davis has advocated in his treatise:

> ". . . *The Courts should develop a requirement that as far as practicable administrators must structure their discretionary power through appropriate safeguards and must confine and guide their discretionary power through standards, principles, and rules.* The requirement should extend also to undelegated power, including especially the extremely important power of selective enforcement." *Administrative Law Text,* page 52 (3d Ed. 1972).

Thus, whether one considers the statutory grant as too vague or the failure of the Administrator to establish standards and guidelines for the utilization of this statutory power, the conclusion is the same in either case: i.e., the lack of adequate standards, either statutory or regulatory, renders the emergency revocation prior to a hearing violative of due process.

The final criterion set forth in *Fuentes, supra,* is that summary revocation prior to hearing can only be justified if "the person initiating the seizure has been a government official responsible for determining, under the standards of a narrowly drawn statute, that it was necessary and justified in the particular instance." 407 U. S. at 91.

The initial orders of revocation were issued over the signature of John J. Keyser, an Assistant Chief Counsel for the FAA (R. I 6, 11, 16, 21, 23, 26). After the petitioners appealed, Mr. Patrick G. Geraghty, Chief, Special Projects & Appellate Branch of the FAA, simply filed duplicate copies of the complaints and certified that an emergency existed (R. I 38, 41).[7]

[7] The chain of command within the FAA runs down from the Administrator to the Deputy Administrator to the Chief Counsel

(*footnote continued on following page*)

There is no doubt that the Administrator is authorized to delegate many of his statutory duties (49 U.S.C.A. § 1344(d)), and in fact the Assistant Chief Counsel was authorized by regulation to issue the initial orders of revocation. 14 C.F.R. § 13.19(b), as modified 38 Fed. Reg. 26,444 (1973). However, subdivision (d) of regulation § 13.19 specifically states that if the certificate holder files an appeal to the Board "the Administrator's order is stayed unless *he* advises the Board that an emergency exists . . ." (emphasis added). The "he" in the cited regulation clearly refers to the Administrator, and there is no other regulation which delegates the declaration of emergency certification to any subordinate. It was therefore improper for the Chief of the Special Projects & Appellate Branch of the FAA to certfiy the emergency to the Board and such conduct constituted the exercise of emergency power by an unauthorized government official.[8]

Faced with the foregoing constitutional difficulties, it appears that the Court of Appeals attempted to justify the due process deficiencies by remarking:

> "The petitioners were aware that an investigation was underway because they had been deposed and the company's records had been subpoenaed. To some extent, therefore, they had been given an opportunity to present explanatory material before the revocations occurred. There is no necessity, therefore, to consider under what circumstances an invitation to submit exculpatory material might be necessary before summary action by the Administrator." (Appendix B)

(*footnote continued from preceding page*)

to the Deputy Chief Counsel to Assistant Chief Counsel, which Mr. Keyser is one of many. Mr. Geraghty was one of numerous branch chiefs working for Mr. Keyser.

[8] Petitioners further contend that it was error for the Board to refuse to review the declaration of emergency certification (R. II 491). 49 U.S.C.A. 1429 contains no limit on the Board's power of review over the Administrator's actions, and, in fact, affirmatively the Administrator. This self-imposed rule of abstention by the Board further denies the petitioners procedural due process.

Clairvoyance has never been a substitute for the notice requirements of due process.[9] Indeed, in order to illustrate the type of notice given to the petitioners herein, the entire deposition of Mr. Reddecliff is printed in Appendix E. The subpoena served upon Air East was equally uninformative since it simply called for the production of *all* personal, operational and maintenance records. When the President of Air East responded to the subpoena, the notice received was as follows:

> "By Mr. Geraghty: Let the record show that we are convened at the Johnstown Cambria County Airport at 13:45 hours, 30, January, 1974, for the purpose of taking return of subpoenas issued to Mr. McKinney as President of Air East, Inc., which were issued pursuant to an order of investigation issued by the Administrator of the Federal Aviation Administration under authority delegated to him under the Federal Aviation Act of 1958, as amended. Such investigation being into the operating practices and procedures of Air East, Inc."

The deposition then went on to ask Mr. B. F. McKinney to identify the Air East records he was producing pursuant to subpoena.

The Court will note that the "notice" referred only to an investigation of Air East, and not the individual petitioners.

[9] In *Aircrane* v. *Butterfield*, 369 F. Supp. 598 (E.D. Pa. 1974), and *Priority Air Dispatch, Inc.* v. *National Transportation Safety Board*, —— F. 2d —— (D.C. Cir. June 19, 1975, Docket No. 73-2169), the operator was given an opportunity to present its views in writing before revocation. Petitioners were not afforded this right, and the failure thereof again illustrates the arbitrary and *ad hoc* procedures followed by the Administrator.

At no time prior to revocation were any of the petitioners told what charges were being considered or given an opportunity to explain any of the alleged offenses uncovered by the FAA investigators.[10] Cf. *Blackwell College of Business* v. *Attorney General,* 454 F. 2d 928 (D.C. Cir. 1971). School children, parolees and prison inmates have more constitutional rights. *Goss* v. *Lopez,* —— U. S. ——, 43 Law Week 4181 (January 22, 1975); *Morrissey* v. *Brewer,* 408 U. S. 471, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972); *Wolff* v. *McDonnell,* —— U. S. ——, 42 Law Week 5190, 5198 (June 26, 1974).

Petitioners would therefore submit that the summary revocation of their aviation licenses was a violation of due process of law and since no statutory or regulatory guidelines exist for the application of this summary power, the unconstitutional procedures occurring to petitioners are bound to recur. Review by this Court is a necessity.

2. The failure to grant the petitioners procedural due process with respect to their appeals from the summary revocations was contrary to constitutional and regulatory precedent.

The appeals herein were reviewed in such a desultory fashion by the Law Judge, Board and Court of Appeals that one can only conclude that procedural due process of law does not exist with respect to alleged air safety violations.

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[10] As Professor James O. Freedman states in his article *Summary Action by Administrative Agencies,* 40 Univ. of Chicago L. Rev. 1 (1972):

> "Requiring an administrative agency to inform an indidual that it is contemplating summary action against him, to describe the general nature of its information and the tenor of its reasoning, and to permit him a brief opportunity to discuss the matter with the agency's staff and advance arguments why summary action should not be taken could be most helpful in reducing the risk of error." (at 49)

A. The failure to make specific charges.

An examination of the complaints herein (App. C A20-A43) reveals that the Administrator revoked petitioners' certificates for allegedly violating federal air regulations, etc., "on numerous occasions." No dates, times, aircraft numbers, component parts, or other factual material are specified so that petitioners could identify the event.

Sections 421.4(d) and 421.23 of the Board's regulations require factual pleading (14 C.F.R.). Although the Law Judge ordered the Administrator to file bills of particulars giving factual details, these bills were equally defective and the petitioners moved to dismiss the complaints for lack of specificity.

In a classic statement which illustrates the prevailing approach at the Board to air safety enforcement proceedings, the Law Judge refused to grant the motion, stating:

> "I am bothered by it and I could, of course, strike the pleading and grant the respondents' [petitioners herein] motion. However, I am not going to do so, even though I think there is merit to the motion, because I think if we get into these technical matters, and I don't mean to discount the importance of technical matters, we will never get to trial on this thing." (R. VI 37)

The petitioners were therefore required to proceed to trial even though their motion had "merit." The due process requirement for notice of specific charges had become a mere "technicality."

It appears abundantly clear that the complaints herein fail to comply with Board rules relating to factual pleading. It is equally clear that the failure of a government agency to adhere to its own rules and regulations constitutes a denial of due process of law. *United States ex rel. Accardi* v. *Shaughnessy,* 347 U. S. 260, 266-268, 74 S. Ct. 499, 98 L. Ed. 681 (1954); *Service* v. *Dulles,* 354 U. S. 363, 388-389, 77 S. Ct. 1152, 11 L. Ed. 2d 1403 (1957); *Vitarelli* v. *Seaton,*

359 U. S. 535, 79 S. Ct. 968, 3 L. Ed. 2d 1012 (1959); *United States* v. *Nixon*, 42 Law Week 5237, 5241 (July 24, 1974).

Of course, the lack of specificity and the failure to give adequate notice so that petitioners could properly prepare their defense were not only regulatory deficiencies, but also constitutional infirmities. As this Court stated in *Morgan* v. *United States*, 304 U. S. 1, 58 S. Ct. 773, 82 L. Ed. 1129 (1938):

> "The right to a hearing embraces not only the right to present evidence *but also a reasonable opportunity to know the claims of the opposing party and to meet them.*" (Emphasis added.) 304 U. S. at 18.

Accord, *In re Ruffalo*, 390 U. S. 544, 88 S. Ct. 1222, 20 L. Ed. 2d 117 (1967); *In re Oliver*, 333 U. S. 257, 273, 68 S. Ct. 499, 92 L. Ed. 682 (1948); *Armstrong* v. *Manzo*, 380 U. S. 545, 550, 85 S. Ct. 1187, 14 L. Ed. 2d 62 (1965).

The Board and the Court of Appeals attempted to justify the lack of specific allegations by stating that the complaints were amplified by the bills of particulars,[11] and the delivery of some twenty-one depositions to petitioners' counsel on the afternoon of the day prior to commencement of trial made petitioners "aware of the heart of the Administrator's case in advance of the hearing."[12]

But what the Board and the Court of Appeals ignored was the fact that the depositions were delivered the afternoon before trial commenced, and the bills of particulars were delivered the first day of trial and on subsequent days during trial. As this Court stated in *In re Gault*, 387 U. S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967):

> "*Notice*, to comply with due process requirements, *must be given sufficiently in advance of scheduled court proceedings so that reasonable opportunity to prepare will be afforded*, and it must 'set forth the alleged misconduct with particularity.'" (Emphasis added.) 387 U. S. at 33.

"Timely notice of allegations and charges is an elemental aspect of due process." *Sarzen* v. *Gaughan*, 489 F. 2d 1076, 1084 (1st Cir. 1973). Accord, *Blackwell College of Business* v. *Attorney General*, 454 F. 2d 928 (D.C. Cir. 1971); Davis, *Administrative Law Text* § 8.02, page 197 (3d Ed. 1972).

The inherent unfairness of the instant procedure whereby the Administrator revoked petitioners' certificates on general allegations; waited until the first day of trial to give any specifics, which the Law Judge agreed were not very enlightening, and then forced the petitioners to proceed to trial while the Administrator prepared his case as he went along, was so alien to the concept of due process, fairness and justice that this Court should strongly condemn such procedures.

B. The failure to dismiss stale charges.

Section 421.25 (14 C.F.R.) of the Board's regulations provides for the dismissal of offenses occurring more than six months prior to the Administrator's orders of revocation. However, if the complaint alleges "lack of qualification," the Law Judge is to examine the allegations, and if they present an issue as to "lack of qualification," he may allow trial on these charges no matter how old they may be.

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[11] A defective indictment cannot be cured even by a good bill of particulars. *Russell* v. *United States*, 369 U. S. 749, 769-770, 82 S. Ct. 1083, 8 L. Ed. 2d 240 (1962); *United States* v. *Conyns*, 248 U. S. 349, 353, 39 S. Ct. 98, 63 L. Ed. 287 (1919). Furthermore, none of the "details" set forth in the bills (R. I 76-243) were proven at trial as evidenced by the Law Judge's complete failure to be specific. The bills as filed were deceptions.

[12] The depositions (save for two) were not a part of the record and therefore could not have been reviewed for content. Even the Law Judge questioned whether these depositions were subject to uniform interpretation (R. VI 59). (See Appendix E.)

Obviously, in proceeding under this section, the Law Judge has to first know the date of the offense so that he can determine whether the statute of limitations has run; but no dates were specified in the complaints. Secondly, the Law Judge has to decide whether the offense charged presents an issue of "lack of qualification." But what is "lack of qualification"? The term is not defined by the regulations, and is apparently subject to an *ad hoc* definition by each Law Judge who is faced with the issue. Cf. *Administrator* v. *Musso,* 30 C.A.B. 1610 (1960).

Since the Federal Aviation Act vests authority with the Administrator to set qualifications for the issuance of airman, air carrier and other aviation certificates (49 U.S.C.A. §§ 1422, 1424 and 1427), one would logically assume that lack of qualification refers to the certificate qualifications issued by the Administrator.[13] The petitioners, however, possessed all of the qualifications required by the regulations to obtain and hold their respective certifications. *None of the complaints recites any failure to adhere to the qualification requirements of the regulations.* How, then, do the petitioners lack qualification?

The FAA and the NTSB apparently work under the unstated theory that, if the Administrator alleges that you committed some unstated number of violations of some unstated regulations, you lack qualification. But cf. *Administrator* v. *Donoghue,* 1 N.T.S.B. 1568, 1569 fn. 7 (1972). Obviously, such an *ad hoc* interpretation of "lack of qualification", which deprives a certificate holder of the benefit of the statute of limitations, is constitutionally improper.

[13] The qualifications required for a mechanic's certificate are set forth in 14 C.F.R. Part 65, Subpart D; for a commercial pilot's certificate in 14 C.F.R. Part 61, Subpart D; for an airline transport pilot's certificate in 14 C.F.R. Part 61, Subpart E; for a repair station certificate in 14 C.F.R. Part 145, Subparts A and B, and for an air taxi certificate in 14 C.F.R. Part 135, Subpart A.

See *Grayned* v. *City of Rockford,* 408 U. S. 104, 108-109, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972).

As the Board advised the Administrator, as far back as 1966:

> ". . . if the Administrator desires to impose sanctions on airmen on the basis of a general duty to exercise 'the degree of care and responsibility required of a certificate holder,' the regulations could be amended to this effect." *Administrator* v. *Buchanan,* 45 C.A.B. 973, 974 (1966).

The regulations were never so amended, and unfortunately, in this case the Board ignored its own precedents, and the Court of Appeals ignored the entire issue.

C. Failure to dismiss charges not alleged to be in violation of any regulation or statute.

Charge 19 of the Air East complaint (R. I 5) charges Air East with intimidation of its pilots, but does not allege any regulatory or statutory provision which allegedly pertains to the offense. The Board has consistently held, except for this case, that no punitive action could be taken against a certificate holder unless there was a violation of a specific regulation. *Administrator* v. *Buchanan,* 45 C.A.B. 973 (1966); *Administrator* v. *Babbitt,* 1 N.T.S.B. 1305, 1307 (1971).

Furthermore, there were a number of charges alleged in the complaints accusing the petitioners of violating instrument approach procedures "approved" in Part 97 of the federal air regulations (R. I 2, pars. 5 and 6; R. I 9, pars. 4(a) and (b); R. I 14, pars. 4(a) and (b); R. I 18, pars. 3(a) and (b)). Of course, instrument approach procedures are not published in Part 97 or in the Federal Register and therefore they cannot be regulatory. *Andrews* v. *Knowlton,* 509 F. 2d 898, 905 (2d Cir. 1975), pet. for cert. filed March 26, 1975 (Docket No. 74-1217). But, in any event,

Part 97 (14 C.F.R.) deals only with "prescribed" procedures and not "approved" procedures. That this is more than a mere semantic difference is disclosed by FAA manual "Terminal Air Traffic Control," order 7110.8C published 1 January 1973 as amended. Note 4 to Section 1020 thereof provides:

> "A 'prescribed' instrument approach procedure is one published in FAR Part 97 and available for public use. An 'approved' instrument approach procedure is one issued to one or more operators for their use. It is not published in FAR Part 97, but is furnished to specific operators and the ATC facilities involved. 'Approved' instrument approaches are not restricted to use only by the operator's to whom issued; ATC is not responsible for determining if an operator/pilot requesting such approach has obtained necessary approval for its use."

Under the FAA's own definitions, an "approved" procedure is not regulatory, and therefore under the above-cited Board precedent it could not constitute a regulatory violation for which a sanction could be imposed. Here again, the Board ignored its own precedent, and the Court of Appeals ignored the entire issue.

D. The Administrator supplied the Board and the Law Judge with prejudicial material outside of the record.

At the close of the hearing on March 22, 1974, the attorney for the Administrator presented to the Law Judge a copy of a letter sent that day from the Administrator to NTSB Chairman John H. Reed. This letter contained certain prejudicial and defamatory remarks concerning the petitioners and also an implied criticism of the Law Judge's actions with respect to certain rulings he made as to the production of witness statements (R. I 248-258). The

receipt of this letter eventually caused Chairman Reed to disqualify himself from further proceedings herein (R. II 381-2). Petitioners' motion to dismiss the complaints herein because of the Administrator's actions was denied by the Law Judge (R. VII 357-370).

Since not one witness testified at the hearing as to any of the acts (economic coercion) mentioned in the material submitted by the Administrator, the presentation of this material in the manner indicated was improper, unethical and a blatant attempt to prejudice the rights of the petitioners herein. Indeed, the Law Judge did convict Air East on Charges 19 which related to alleged coercive acts.

Unfortunately, the Court of Appeals condoned this event with a footnote to the effect that it did not think that the material submitted was prejudicial. Cf. *Nadiak* v. *Civil Aeronautics Board,* 305 F. 2d 588, 594 (5th Cir. 1962). Of course, the Chairman of the NTSB thought it so improper (R. I 265-266) that he disqualified himself, and the Law Judge questioned the propriety of submitting such material to him (R. VII 366-368).

It is well acknowledged that Government misconduct is a proper basis upon which to dismiss indictments. *United States* v. *Russo,* Crim. No. 9373 (C.D. Cal. 1973); *United States* v. *Banks,* 16 Crim. L. Rep. 2090 (D. S.D. October 9, 1974); cf. *United States* v. *McCord,* —— F. 2d —— (D.C. Cir. Dec. 12, 1974), slip opinion pp. 22-28, 43 Law Week 2257; *Camero* v. *United States,* 375 F. 2d 777 (Ct. Cl. 1967). The only way that the effect of such prejudicial behavior and misconduct could have been removed from the proceedings herein was to dismiss the complaints and it was error not to have done so.

E. Inadequate findings of fact, conclusions and the reasons therefor.

Section 421.32(b) of the Board's regulations set forth certain requirements that shall be contained in the Law

Judge's initial decision. These requirements are:

> "The initial decision shall include a statement of findings and conclusions, as well as the reasons or bases therefor, upon all material issues of fact (including credibility of witnesses, where such finding is material), law, or discretion, presented on the record, and the appropriate sanction or denial thereof." 14 C.F.R. § 421.32(b).

Unfortunately, the findings herein do not meet the requirements of § 421.32(b). In fact, there are no findings as such—only a rambling summary of the testimony (Appendix D).

As Mr. Justice Brennan pointed out on a prior occasion, where findings are no more than a summary of the evidence, they are inadequate (*Delaware, L. & W. R. Co.* v. *City of Hoboken,* 10 N. J. 418, 427, 91 A. 2d 739, 743 (1952)), and the matter should have been remanded for specific findings, or the Board should have issued new findings pursuant to § 421.36 (14 C.F.R.). *Carey* v. *Civil Aeronautics Board,* 275 F. 2d 518 (1st Cir. 1960); *Braniff Airways, Inc.* v. *Civil Aeronautics Board,* 306 F. 2d 739 (D.C. Cir. 1962); *Saginaw Broadcasting Co.* v. *Federal Communications Commission,* 96 F. 2d 554 (D.C. Cir. 1938); *American Smelting & Refining Co.* v. *Federal Power Commission,* 494 F. 2d 925, 944-945 (D.C. Cir. 1974); 2 Davis, *Administrative Law Treatise,* Chapter 16 (1958, 1970 Supp.).

The Court of Appeals again gave this deficiency footnote treatment by remarking that it thought the Law Judge's decision to be "comprehensive and unusually well-detailed" (Appendix B). However, an examination of the findings herein has to leave one wondering if the term "finding of fact" has taken on a new meaning. For example, with respect to the complaint against petitioner Wilkinson, the Law Judge's findings with respect to

Charge 3(h) were: The charge is supported by the evidence and it is so found"; and with respect to Charge 3(i); "The evidence supports this charge and it is so found." How can these be findings of fact?

By pointing out the specific findings above, petitioners do not imply that they agree that the other findings are correct. Indeed, they contest all the findings as being inadequate because the "findings" only state what various people testified to, no specific acts or events are detailed, and are conclusory as opposed to factual.

In addition, the Law Judge made findings based upon non-existent testimony. For example, the Law Judge found that petitioner Tallent violated Charge 4(e) (Appendix D, p. A117) based upon the testimony of the witnesses Montague and Sayther, but neither one testified against Tallent on this subject. Likewise, petitioner McKinney was found to have violated Charge 4(a) based upon the testimony of Montague (Appendix D, p. A119), but an examination of the record reveals that Montague never testified against McKinney on this charge. Likewise, the Law Judge convicted petitioner Wilkinson of Charge 3(a) based upon the testimony of the witnesses Howell and Dunn (Appendix D, pp. A124-A125), yet the record reveals that these witnesses gave no testimony against Wilkinson on this charge. Petitioner's citation of similar defects in the evidence relating to Charge 8 of the Air East complaint were characterized by the Board as an attempt to "undermine" the testimony and evidence (Appendix C, p. A63).

Furthermore, findings that someone made an "illegal approach" or an "unauthorized approach" or utilized an "unauthorized procedure" are meaningless and do not adequately advise the reviewing court of the grounds for the administrative action. *Securities and Exchange Commission* v. *Chenery Corp.,* 318 U. S. 80, 94, 63 S. Ct. 454, 87 L. Ed. 626 (1943); *Commissioner* v. *Duberstein,* 363

U. S. 278, 292-293, 80 S. Ct. 1190, 4 L. Ed. 2d 1218 (1960); cf. *Schneiderman* v. *United States,* 320 U. S. 118, 129-131, 63 S. Ct. 1333, 87 L. Ed. 796 (1943); 5 U.S.C.A. § 557(c)(3)(a). This is a classic case which demands remand for adequate findings and the reasons therefor.

F. Failure to apply correct principles of law.

Although the findings herein are totally inadequate to advise the reviewing court if the agency applied the correct principles of law, several salient errors are disclosed which warrant reversal.

For example, the administrative agency failed to apply the proper standard in reviewing the testimony of the government witnesses. An examination of the Law Judge's opinion reveals that he cited and relied upon only that testimony by government witnesses which was adverse to petitioners. There is no mention of the instances where government witnesses contradicted each other or gave favorable testimony to the petitioners. That testimony was ignored by the Law Judge and the Board. Cf. *Administrator* v. *Bradway,* 45 C.A.B. 956, 968-969 (1966). This was error because the record as a whole must be considered—i.e., both the good and the bad. *Universal Camera Corp.* v. *N.L.R.B.*. 340 U. S. 474, 488 71 S. Ct. 456, 95 L. Ed. 456 (1950); 5 U.S.C.A. § 706; and when an administrative agency accepts *carte blanche* all of the adverse testimony of the government witnesses, ignores testimony favorable to petitioners given by said witnesses, and totally rejects all of petitioners' evidence, a reviewing court should not casually accept this as a simple choice of credibility. *N.L.R.B.* v. *Union Pacific Stages,* 99 F. 2d 153, 158 (9th Cir. 1938).

Furthermore, the administrative agency herein applied the wrong standard for reviewing the testimony by the government witnesses. The Law Judge refused to give any consideration to the fact that all of the Government's witnesses were testifying pursuant to a promise by the FAA that their cooperation would be taken into consideration with respect to their own violations.[14] With respect to this point, the Law Judge stated:

> "Much also was made of the fact that during the course of the various depositions which were obtained from witneses by the Administrator, each witness was told that he would not get immunity by testifying but his cooperation would be taken into consideration by the Administrator in determining any sanction imposed on him or any enforcement action taken against him, and that therefore each witness came in and exposed himself as having committed these various violations on the strength that he would be released from any obligation in connection with them.
>
> It is an interesting theory but not a very realistic one. It implies that the Federal Aviation Administration conspired with these various witnesses and encouraged them to falsify their testimony so that charges could be made against Air East and the other respondents.
>
> That is the only extension of such a defense I can reach and I find the argument without any merit whatsoever." (R. II 398)

While the Law Judge's innocence of the real world (apparently shared in by the Board) is refreshing, it is directly

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[14] At no time during the trial did the Administrator's attorney ever voluntarily disclose any information relating to the promises made to government witnesses for their cooperation. In *United States* v. *Mitchell,* 372 F. Supp. 1239, 1257 (S.D.N.Y. 1973), it was held that all "favors or deals" between the Government and its witnesses had to be disclosed upon the witness being called to testify. The lack of candor displayed by the Administrator herein is also reflected by his attorney's representation to the Court that no exculpatory material existed, when in fact there was such evidence (R. XII 2116-25). Cf. *Brady* v. *Maryland,* 373 U. S. 83, S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

contrary to all rules by which such testimony should be evaluated. Thus, in *Giglio* v. *United States,* 405 U. S. 150, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972), this Court held that it was reversible error for the jury not to be made aware of and to consider in its deliberations on credibility the fact that a promise of leniency had been made to a key witness in return for his testimony. See *Napue* v. *Illinois,* 360 U. S. 264, 79 S. Ct. 1173, 3 L. Ed. 2d 1217 (1959); *United States* v. *Murray,* 445 F. 2d 1171, 1176 (3d Cir. 1971).

The Third Circuit recognized the validity of petitioners' point but surmised "we have no doubt that this factor was properly evaluated [by the Law Judge] before the decision was announced" (Appendix B, p. A16). How the Third Circuit could make this pronouncement in light of the above-cited quotation by the Law Judge at the time he announced his decision is inexplicable.[15]

Finally, with respect to credibility, both the Law Judge and the Third Circuit pointed out that testimony of Air East's weather observer was totally unworthy of belief. In some magical fashion the brush that tarred this witness' testimony also tarred all testimony favorable to petitioners. What the Law Judge, the Board and the Third Circuit all overlooked or ignored was the fact that the weather observer was called by the Government as its witness. Since the Government called the weather observer to testify, the Administrator vouched for his credibility (*United States* v. *Jannsen,* 339 F. 2d 916, 919 (7th Cir. 1964)), and since the witness was never declared to be hostile (R. VI 276-8), it was improper for the Government to

[15] Likewise inexplicable is the statement by the Court of Appeals that "the only evidence presented in favor of the petitioners was their own testimony." This is false and can only reflect the fact that the Court of Appeals did not read the record. See, for example, R. VIII 969, 1026, 1048, 1065; IX 1322, 1328, 1335; X 1702.

impeach him. *Rothschild* v. *New York,* 388 F. Supp. 1346, 1349 (S.D.N.Y. 1975); *Shreve* v. *Hot Shoppes, Inc.,* 184 F. Supp. 436, 439 (D.D.C. 1960). Petitioners never called this witness to testify on their behalf.

It is obvious from the foregoing that erroneous standards were used throughout the proceedings below to judge credibility, and such an error is a denial of due process which requires reversal. As the Court of Appeals held in *Breeden* v. *Weinberger,* 493 F. 2d 1002 (4th Cir. 1974):

> ". . . administrative findings based on oral testimony are not sacrosanct, and if it appears that credibility determinations are based on improper or irrational criteria they cannot be sustained." (493 F. 2d at 1010.

Accord, *National Labor Relations Board* v. *Florida Citrus Canners Cooperative,* 311 F. 2d 541 (5th Cir. 1963); *Portable Electric Tools, Inc.* v. *National Labor Relations Board,* 309 F. 2d 423 (7th Cir. 1962).

The Court of Appeals also misapplied the applicable legal principles involved with respect to the review of administrative agency decisions. Cf. *Greater Boston TV* v. *F.C.C.,* 444 F. 2d 841, 850-853 (D.C. Cir. 1970). Although recognizing the substantial evidence test (49 U.S.C.A. § 1486(e)), the Court of Appeals stated:

> "If only a single witness had provided this type of evidence, there might be difficulty in determining whether it was sufficiently probative to sustain the burden of proof. However, the cumulative effect of the testimony of many witnesses who appeared and their complementary corroboration made it possible for the fact finder to decide the contested issues." (Appendix B)

Reduced to basics—the Court of Appeals was acknowledging that the evidence was "junk" testimony, but because

there was a great deal of junk, substantial evidence existed. Petitioners would submit that it is the "quality" of the evidence and not the "quantity" that must be considered in determining whether substantial evidence existed.

In addition to the previously mentioned erroneous principles of law, the Law Judge and the Board also found violations of certain regulations despite petitioners' claims that the procedures utilized had been approved by FAA officials. The Law Judge took the position that ". . . it is fairly well established that the government cannot be estopped to deny the authority of any employee to alter its practices" (Appendix D, p. A102). This is clearly not the law. *United States* v. *Pennsylvania Industrial Chemical Corp.,* 411 U.S. 655, 673-4, 93 S. Ct. 1804, 36 L. Ed. 2d 567 (1973); *Administrator* v. *Fabian,* 31 C.A.B. 1106 (1960). Review herein should clearly have considered the principle that no violation could be found where the procedure was specifically approved by FAA officials, especially when the Act vests authority in the Administrator (or his designee) to grant exemptions from any rule or regulations. 49 U.S.C.A. § 1348(e). The Court of Appeals ignored the issue.

Another erroneous principle applied below related to the alleged falsification of record. The Board had previously taken the position that any falsification would have to be of a material fact in order to constitute a regulatory violation. *Administrator* v. *Cochran,* 1 N.T.S.B. 136, 138 fn. 4 (1967). But one may search all of the opinions below for any finding that the alleged falsifications herein were of material facts. The opinions below are devoid of any such statement.

Many of the charges herein[16] related to the issue of whether or not Air East's management knew that one of

[16] See Charges 12, 13, 14 and 15 of the Air East complaint (R. I 3-4).

its employees was apparently forwarding some false check-ride forms to the Pittsburgh GADO. However, any activities of the employee as an FAA-designated check pilot were carried out in his role as an FAA inspector and not as an Air East employee (R. V 133-4; VIII 717-8). In fact, Mr. Fahey, Chief of the GADO office in Pittsburgh, acknowledged that when such checks are given the check pilot is carrying on an FAA function rather than a company function and that "He's working for us" (R. VIII 718).

In light of this testimony, petitioner Air East submits that when its employee was performing his FAA-designated duties he was a "borrowed servant" working for the United States Government. In *Denton* v. *Yazoo & Mississippi Valley Railroad Co.,* 248 U. S. 305, 52 S. Ct. 141, 76 L. Ed. 310 (1932), this Court heid that a railroad employee who was performing duties for the Post Office Department was a borrowed servant and the railroad was not responsible for his acts. As the Court stated the rule:

> "When one person puts his servant at the disposal and under the control of another for the performance of a particular service for the latter, the servant, in respect of his acts in that service, is to be dealt with as the servant of the latter and not of the former." 284 U. S. at 308.

Since no legal relationship existed between Air East and its employee when he was in a borrowed-servant status, Air East would not be responsible for his acts. The Board and the Third Circuit ignored this legal principle.

Based upon the foregoing, it is clear that incorrect legal standards were applied and correct legal principles were ignored by the Board and by the Court of Appeals. Findings based upon an erroneous application of the law cannot stand. *Securities and Exchange Commission* v. *Chenery Corp.,* 318 U. S. 80, 94, 63 S. Ct. 454, 87 L. Ed. 626 (1943).

G. Failure to give adequate time to prepare an appeal and grant oral argument.

The Board's rules require an appeal to be taken within two days of the Law Judge's initial decision and a brief to be filed on appeal within five days thereafter. 14 C.F.R. § 421.41(a)(b). How is it physically possible with a transcript of some 4,000 pages and 150 exhibits containing several thousand pages to prepare an appellate brief in five or seven days? Again, this is a failure to provide a reasonable opportunity to be heard and constitutes a denial of due process of law.

Furthermore, the petitioners' request for oral argument before the Board on their appeal was denied on the basis "that the issues in this proceeding have been exhaustively litigated and, in our view, no useful purpose would be served by further argument". While petitioners recognize that there is no absolute right to oral argument, whether the failure to provide for it constitutes a denial of due process will depend upon the particular circumstances of each individual case. *Federal Communications Commission* v. *WJR*, 337 U. S. 265, 275-277, 69 S. Ct. 1097, 93 L. Ed. 1353 (1949).

Due process required oral argument in the instant case because it is clear that the Board never had the opportunity to properly review the points raised by petitioners on their appeal herein. Petitioners mailed their brief from New York on Friday, May 3, 1974. The brief was not received by the Board until Monday, May 6, 1974. Yet, by May 10, 1974, the Board would have the reviewing court believe that it had fully reviewed petitioners' brief and the legal authorities cited therein; reviewed 4,000 pages of testimony and hundreds of exhibits to determine if the findings were supported by a preponderance of the reliable, probative and substantial evidence and prepared and/or reviewed the contents of its 57-page opinion and order.

Any federal appellate court knows that such a process is physically impossible; yet, this is the type of justice that suffices in the NTSB, where apparently the philosophy reigns supreme that so long as "air safety" is involved any abuse of individual rights will be tolerated. The time has come to call a halt to such abuses.

The official minutes of the NTSB reveal that the Board met on May 10, 1974, for a total of 55 minutes and that its discussions related to three separate items on the agenda. The only legal representative present was NTSB attorney Stuhldreher, who could hardly be expected to present petitioners' position since he apparently had already drafted the Board's adverse decision (R. II 457). Clearly, the only way that the Board could have become aware of petitioners' position herein was to grant oral argument, and the failure to do so constituted a denial of due process. *Londoner* v. *Denver,* 210 U. S. 373, 386, 28 S. Ct. 708, 52 L. Ed. 1103 (1908); *WIBC* v. *Federal Communications Commission,* 259 F. 2d 941 (D.C. Cir. 1958), cert. den. 358 U. S. 920, 79 S. Ct. 290, 3 L. Ed. 2d 239 (1958).

H. Refusal to pass upon the constitutionality and application of various federal air regulations.

Although the petitioners raised issues pertaining to the constitutionality and the application of various federal air regulations,[17] the Board refused to review this issue and the Court of Appeals ignored it.

The Board has consistently held in safety enforcement proceedings that it lacks jurisdiction to entertain attacks on the validity or reasonableness of regulations promulgated by the FAA Administrator. Appendix C, fn. 108;

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[17] The federal air regulations challenged as being unconstitutionally vague were 14 C.F.R. §§ 91.9, 91.29, 91.31 and Part 97 while those alleged to be inapplicable to the facts herein were 14 C.F.R. §§ 43.5, 43.9, 43.13, 43.15, 91.116, 91.117, 91.165, 135.43, 135.111 and 145.61.

Administrator v. *Roberts,* 1 N.T.S.B. 1627, 1628 (1972); *Administrator* v. *Lloyd,* 1 N.T.S.B. 1826, 1828 (1972). If the NTSB will not pass upon the constitutionality of the Administrator's regulations, then obviously the only recourse the petitioners have is the courts. But here the Court of Appeals ignored the entire issue.

While admittedly these regulations are technical in nature, only the courts remain to give any legal interpretation thereto and protect the rights of those who are prosecuted. *Pike* v. *Civil Aeronautics Board,* 303 F. 2d 353 (8th Cir. 1962); *United States* v. *Ozark Air Lines, Inc.,* 374 F. Supp. 234 (E.D. Mo. 1974), aff'd 506 F. 2d 526 (8th Cir. 1975). As the Court of Appeals for the Seventh Circuit ruled in *Bence* v. *Breier,* 501 F. 2d 1185 (7th Cir. 1974):

> ". . . we do not think it just to simply defer to a mere governmental assertion of impracticality respecting rules challenged for vagueness. Due process demands that each challenged rule be examined in its context to determine whether in fact further specificity would be feasible or practicable." 501 F. 2d at 1189 fn. 2.

The constitutionality and application of the challenged regulations should be judicially reviewed.

I. Revocation was not an authorized penalty.

Petitioners submit that their certificates could not be revoked because they had not violated any federal air regulation that provides for a penalty of revocation. The Court of Appeals affirmed the revocations on the theory that they "were within the scope of authority granted to the Board . . ."

We note initially that the Board is not given the power to revoke, but only to affirm, amend, modify or reverse the Administrator's initial decision to revoke. 49 U.S.C.A. § 1429. It is petitioners' contention that the initial decision

by the Administrator was improper since it was contrary to his published regulations.

There is no doubt that the statute gives the Administrator the power to revoke. 49 U.S.C.A. § 1429. However, the Administrator has published regulations that he will revoke if federal air regulations (14 C.F.R.) §§ 61.6, 61.20(b), 61.48, 65.18, 65.20 and 67.20 are violated. No other federal air regulations set forth revocation as a possible penalty.

Since the Administrator has given public notice as to the penalty of revocation for only certain specified violations, and the petitioners did not violate any of these regulations, it is clearly improper to permit an *ad hoc* revocation in this case. As the Fourth Circuit recently held *en banc* in *Cross* v. *United States,* 512 F. 2d 1212 (4th Cir. 1975):

> *"Due process on the issue of sanction requires that the punishment* follow rationally from the facts, *be authorized by the statute and regulations,* and aim toward fulfillment of the Act's purposes." (Emphasis added.) 512 F.2d at 1217-1218.

And as Mr. Chief Justice Burger found in another context:

> "In short, we construe, the pertinent statutory scheme as authorizing debarment but as not authorizing debarment without either regulations establishing standards and a procedure which are both fair and uniform or basically fair treatment of appellants." *Gonzalez* v. *Freeman,* 334 F. 2d 570, 580 (D.C. Cir. 1964).

Cf. *Pike* v. *Civil Aeronautics Board,* 303 F. 2d 353 (8th Cir. 1962); *Waters* v. *Peterson,* 495 F. 2d 91, 100-101 (D.C. Cir. 1973); *Bence* v. *Breier,* 501 F. 2d 1185 (7th Cir. 1974). Considering the totality of unfairness and lack of due process present throughout the entire proceedings herein, it was improper to revoke the petitioners' certificates. *Blackwell College of Business* v. *Attorney General,* 454 F. 2d 928 (D.C. Cir. 1971).

CONCLUSION

For the reasons stated, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Third Circuit.

Respectfully submitted,

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